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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 152

CARLOR COMPANY, INC., A FLORIDA CORPORATION,
Petitioner,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION OF THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled case on January 30, 1953 (R. 80) affirming a summary Final Decree of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County (R. 38).

Opinions Below

The opinions of the Circuit Court (R. 27) and the Supreme Court of Florida (R. 71) are not reported.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on January 30, 1953 (R. 80). The petitioner's time for filing petition for writ of certiorari was extended to and including June 29th, 1953 (R. 81). The constitutional issue here presented was raised in the petitioner's complaint (R. 19) and in its answer in the condemnation action (R. 62) and was overruled in the courts below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Question Presented

The question presented is whether the petitioner has been deprived of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

Statute Involved

The pertinent statutory provision involved is Section 73.01 Florida Statutes (Laws 1941, c. 20930, Sec. 1), which reads, in part, as follows:

> "73.01 Eminent Domain; Instituting proceedings; contents of petition.
>
> Whenever the right, to take private property for public use without the consent of the owner, is now, or may hereafter be, conferred by the constitution or any general or local law of this state upon the state or any of its bodies politic and corporate, upon any state, county, municipal or district authority, public body, officer or agent upon the United States or upon any other person, those having such right may file a verified petition therefore in the circuit court of the county where the property lies, which petition shall set forth:
>
> (1) The authority under which, and the public use to which, the property is to be acquired, and that the property is necessary for that use; * * *"

Statement

The petitioner, for many years, had owned the greater part of Virginia Key, an island about one and one-half miles long and one-half mile wide, located in Biscayne Bay, about three miles east of the City of Miami and just south of the City of Miami Beach (R. 22A). On March 17, 1943 the Commission of the City of Miami adopted a resolution to condemn the petitioner's land for "municipal landing fields, airport, public landings, docks, wharves and warehouse purposes" (R. 24, 25).

On April 30, 1943 the City instituted an action in the Circuit Court alleging, as required by Section 73.01, Florida Statutes, *supra*, p. 2, "it is necessary that said City of Miami acquire said property for port and airport purposes" (R. 40).

The answer denied this allegation (R. 46), and pleaded various defenses and facts supporting its claim that there was no public necessity for the acquisition of this property (R. 45-50). Most of these allegations were stricken out on plaintiff's motion (R. 54). The defendant then served an amended answer (R. 55-59) and, again, most of the defenses and the facts pleaded in support thereof were stricken out by order of the Court (R. 63). The final amended answer (R. 61, 62) alleged, in part:

> "that the port authority as now constituted does not intend to use the said land for port or airport purposes but is seeking other sites which are more adaptable for the uses described in the said petition, and the only present purpose of the said City of Miami is to speculate and deal with said property in accordance with its own caprices, which may change from time to time, thereby depriving the present owner of its right to hold and own the said property and to be entitled to receive therefor the full compensation which it is reasonable to expect said property to bring when

> the country returns to normal conditions, and that is not the function of municipal government, nor does the City have any constitutional or statutory powers to enter into such speculative transactions with private property, and for the reasons hereinabove set forth, this defendant says that the said City proposes to deprive Carlor Company, Inc. of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

Although the defendant's final amended answer specifically denied many of the allegations of the complaint (R. 61, 62) and properly raised the issue of "public necessity" (R. 61), the plaintiff, nevertheless, was awarded judgment *without submitting any evidence whatsoever to the Court.* The Decree (R. 63-64) reads as follows:

> "This cause comes on before this Court for hearing upon the petitioner's petition and the answer of the defendant, Carlor Company, Inc. (as amended) raising the question of the public necessity and public purpose of said condemnation proceedings; **no evidence having been offered on behalf of either petitioner or defendant in respect thereto,* it thereupon appears that the presumptions of law shall prevail and it is thereupon determined that there is a public necessity for the taking, and the taking is for public use."

Subsequently, in a separate proceeding under the Laws of Florida, the damages were fixed by a jury and paid to the defendant. Final judgment was entered on August 14, 1944 (R. 64-66).

The City made no attempt to develop the property for a port or airport and, on July 11, 1951, within the seven year statute of limitations (Section 95:12 Florida Statutes), the petitioner instituted an action in equity to recover its

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* *All italics are our own.*

property, tendering in its complaint the return of the amount received under the condemnation judgment, with interest thereon (R. 18). The complaint alleged in considerable detail that the City acquired the property fraudulently (R. 2-14) in violation of plaintiff's rights under the Fourteenth Amendment to the Federal Constitution (R. 19), and that the plaintiff did not discover the fraud until 1951, shortly before the action was commenced (R. 3, 34).

On the defendant's motion, the complaint was dismissed (R. 27-30). The plaintiff, with the permission of the Court, then served an amended complaint (R. 31-37). On June 18, 1952 the amended complaint was dismissed and a summary Final Decree was entered against the plaintiff (R. 38). Plaintiff appealed to the Supreme Court of Florida, which affirmed the summary Final Decree on January 30, 1953 (R. 80).

Specification of Errors to Be Urged

The Supreme Court of Florida erred:

1. In failing and refusing to hold that the condemnation proceeding instituted against the petitioner by the City of Miami deprived the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

2. In holding that the petitioner was not entitled to a trial or hearing upon the cause of action alleged in its complaint.

3. In affirming the summary Final Decree of the Circuit Court.

Reasons for Granting the Writ

I

THE PETITIONER WAS DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The petitioner has been denied its day in court, both as a plaintiff and as a defendant.

In the condemnation proceeding, when the City of Miami was the plaintiff, the Court disregarded the denials in the answer and, without hearing any evidence whatsoever, awarded final judgment in the City's favor on the basis of a questionable presumption (R. 63-64).

In the equity action, when the petitioner was the plaintiff, it was again denied its day in court when its complaint was dismissed (R. 38), despite the fact that it contained specific and detailed allegations of fraud supported, in certain instances, by documentary evidence.

The Court below apparently proceeded on the assumption that the plaintiff was required to *prove* fraud in its complaint. It concedes, as indeed it must, that the judgment in condemnation could be collaterally attacked "in cases of fraud" (R. 75) and stated:

> "The question of necessity to acquire the property for the purposes in question was likewise concluded by the proceedings in eminent domain, including the final judgment and the fact that there was no appeal, *unless the question of determination of necessity was the result of fraud*" (R. 77).

The opinion then goes on to state that the complaint "contains general allegations of fraud coupled with specific acts" but concludes that "the general allegations of fraud are wholly insufficient" (R. 77) and that the documentary evidence was "not binding upon anyone" (R. 77-78).

The Court below was perhaps justified in holding that the three documents annexed to the complaint did not conclusively *prove* fraud on the part of the City. Obviously, the plaintiff could not be expected and was not required to produce conclusive documentary evidence of the City's fraud. The rule laid down by this Court as long ago as *Rea* v. *Missouri,* 17 Wall, 532, 543, has been universally followed.

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced. It was not necessary in this case, for the defendants, in order to maintain the issue on their part, to prove by direct and positive evidence, that Fuller had a secret trust or property in the goods. It was sufficient if they proved such facts and circumstances tending to that conclusion as might reasonably induce the jury to believe that he had such trust or property." *Mammoth Oil Co.* v. *U.S.,* 275 U.S. 13; *Connolly* v. *Gishwiller,* 162 Fed. 2d 428, 433; *Philadelphia Storage Battery Co.* v. *Kelley-How-Thomson Co.,* 64 F. 2d 834, 837.

The proper function of a complaint is to tender issues,—not to set forth all of the evidence in meticulous detail. It was not necessary to set forth in this complaint all the specific evidence available to the petitioner. Nevertheless, the complaint was dismissed even though it contains a wealth of detail, indeed more than would ordinarily be required to state a cause of action in fraud.

The opinion of the Court below refers to the insufficiency of the three documents but casually ignores all the other allegations of the complaint. Due process is effectually denied if a complaint grounded in fraud can be dismissed and a hearing denied to the plaintiff because the fraud is not established in the complaint by documentary evidence.

A thorough analysis of the allegations of the complaint

and the physical, economic, geographic and evidentiary facts upon which the petitioner relies to establish his cause of action would unduly extend this petition. We deem it essential, however, to review briefly the basic facts which the petitioner would be entitled to prove at a hearing, under the allegations in its complaint.

Proceedings to condemn this property were instituted at a time when ships were being burned and sunk by submarines and the beach was littered with debris from sinking ships (R. 7). The condemnation resolution was adopted on the pretext that an airport on this island was necessary for national defense and that it would be financed by Federal funds. The City thereby put the property owner in the difficult position of obstructing a defense project. City officials had previously advocated the acquisition of this property for other purposes but the Council failed to act on such suggestions. The City officials obtained public support for an airport as a patriotic defense project although, before they acquired the property, they knew, but concealed the fact, that the Secretary of War had specifically rejected this island as a suitable site for an airport (R. 3).

The City's application to the Secretary of War and his rejection of the project were classified material, unavailable to the petitioner, until it was accidentally discovered by its attorneys in 1951. The complaint alleges:

> "That notwithstanding the confidential and trust nature of the power delegated to said City of Miami by the Legislature of the State of Florida and its duty to this court, the general public and plaintiff herein, the said City of Miami in the exercise of such power, did wantonly and capriciously prosecute the said suit to conclusion under the guise of a necessity for the use of said property for port and airport purposes when, in fact, it could not use any of said lands for such purpose and when, in fact, it never intended, even from the beginning, to use the lands of the plaintiff for the said

> purpose, but proceeded in said suit with the intention to fraudulently and deceitfully deprive plaintiff of its lands for private purposes, * * *'' (R. 4).

The City officials occupied a fiduciary position and owed the plaintiff and the citizens of Miami the positive duty of making a full disclosure of material facts. *State Board of Administration* v. *Pasco County,* 156 Fla. 37, 22 R.C.L. p. 379.

While the City was urging the necessity for acquiring this island for an airport on the ground that the City's existing airport facilities were inadequate, the City was secretly negotiating for expansion of its existing airports and, while advocating the use of petitioner's property as a seaplane base, it knew that seaplanes were becoming obsolete and that its existing seaplane base at Dinner Key was in the process of abandonment. (R. 7-9).

Under the complaint in this action petitioner would be entitled to introduce in evidence the public statements of responsible city officials, proceedings in the Council, public and private offers for the property by private real estate operators and the consideration given to such offers by City officials. It could show that the Director of Public Service of Miami wrote to the City Manager to the effect that the property should be acquired "even if the Port Project should never become an actuality" (R. 12, 20) and that the acquisition of the island "would largely help toward solving the City's financial difficulties" (R. 13, 23).

Plaintiff would be entitled to establish the fraud alleged in the complaint by proof of subsequent acts of the City. It could prove that the City never made any effort whatsoever to develop the island for an airport or port (R. 35) but that, on the contrary, City officials have publicly advocated and considered the sale of the petitioner's property to private real estate interests, as well as for civic use as an

aquarium, a colored bathing beach, a sewage disposal plant and a Pan-American Trade Center (R. 36).

Of vital significance is the complete unsuitability of this island for an airport or a port of any kind. Airplanes would be required to approach from the west over the City of Miami; from the north over the City of Miami Beach; from the south over Biscayne Key (R. 22A). The only open approach is from the east over the Atlantic ocean but even this approach is hazardous to planes as well as to the 4,000 registered yachts and sailing craft and the additional thousands of unregistered craft in the area (R. 9). Not to be overlooked is the damage from hurricanes which have caused the water to rise 18 feet above mean low water (9, 10).

The most casual reference to the physical facts set forth in the complaint (R. 5-12, 22A, 33) will show that the land was never suitable for an airport and, since the disasters at Elizabeth, New Jersey, it is crystal clear that the land will never be used for an airport. The circumstantial evidence to establish fraud cannot be spelled out in conclusive detail in a complaint. The allegations in the complaint find convincing support, nevertheless, in the incontrovertible fact that the City did not use this property for an airport and that city officials have advocated and considered its sale to private interests or its use for other vague civic purposes.

As this Court pointed out in *Cincinnati* v. *Vester*, 281 U.S. 439, 448,

> "It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation * * *. The power conferred upon a municipal corporation to take private property for public use must be strictly followed."

In concluding this summary review of the facts, one serious factual error in the opinions of the Courts below should

be corrected. The Circuit Court stated, and the Supreme Court repeated the statement:

> "*Since the conclusion of the condemnation proceedings a causeway has been erected* between the mainland and Virginia Key. Being now thus readily accessible the value of the lands on Virginia Key has been tremendously enhanced." (R. 28, 72).

This statement is very misleading. The construction of the causeway was commenced in October, 1941, almost two years *before* the judgment of condemnation (R. 13, 64). When the City passed its resolution to acquire the property "the building of the causeway was well advanced, with most of the heavy construction completed" (R. 13) and "the funds to insure the completion of the construction were on deposit in a bank in Miami" (R. 33). The Court, on a trial, would be entitled to find that the City acquired this property, not for the public purpose it professed, but because it knew that the value would increase upon completion of the causeway.

In Florida, the issue of "public necessity" is a judicial question and the burden is on the municipality to prove the necessity for the taking. *Wilton v. County of St. John's,* 98 Fla. 26. *Sibley* v. *Volusia County,* 147 Fla. 256.

The refusal of the Florida courts to accord petitioner a trial in this case is a violation of the petitioner's rights under the Federal Constitution. *Hairston* v. *Danville & Western R. R. Co.* 208 U.S. 598, 606. Extended citation of authority seems unnecessary but reference may be made to *Nichols on Eminent Domain,* 2nd Ed. Vol. I, Sec. 4.11(2), p. 377-9, where it is said:

> "It is obvious that, if property is taken in ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owners' constitutional rights call for protection by the courts. So also, the due process

clause protects the individual from spoliation under the guise of legislative enactment. * * *

While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts * * * would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. * * *

It being settled that, while necessity is not primarily a judicial question, there may be such absolute lack of necessity as to render the proceedings void, *it necessarily follows that an "owner who alleges such lack of necessity is entitled to have the question passed upon by a judicial tribunal."*

In the same work, Vol. II, Sec. 7.1(4) p. 429, it is pointed out:

"Where property is taken for a public use by eminent domain, *the proper exercise of the power is predicated upon the premise that such property will be devoted to the public use for which it is taken within a reasonable time after the taking.* If the ostensible use is merely a cloak for an ulterior private use it is invalid and constitutes a fraud upon the owner. It is immaterial, in such case, that an actual fraudulent intent cannot be attributed to the condemnor."

Almost invariably, fraud and conspiracy cases must be proved by circumstantial evidence. The oft repeated statements of courts that a wide latitude must be allowed in the introduction of evidence and circumstances in fraud and conspiracy cases would otherwise be meaningless. *Cooper* v. *U. S.*, 9 F. 2d 216; *Dimmick* v. *U. S.*, 135 Fed. 257; *Wigmore, Evidence*, 2nd ed., Vol. 1, § 41. The same considerations are applicable to the determination of the question

whether a complaint, in an action based on fraud, states a cause of action.

In *Madisonville Traction Company* v. *Saint Bernard Mining Company,* 196 U. S. 239, 251, 252, this Court said:

> "It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That "principle, this court has said, grows out of the essential nature of all free governments. *Loan Association* v. *Topeka,* 20 Wall, 655; *Cole* v. *LaGrange,* 113 U.S. 1, 6." * * * It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

This Court declared in *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U.S. 226, 235:

> "In determining what is due process of law regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is affected under the forms of legislation.' *Davidson* v. *New Orleans,* 96 US, 97, 102. *The same question could be propounded and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law.*"

A statute which denies a property owner redress when his land is taken by a municipality for a private purpose would

unquestionably be unconstitutional. *Missouri Pacific Railway Co.* v. *Nebraska,* 164 US, 403, 417. The violation of constitutional rights is of the same character when the property owner is denied his day in court by judicial decision.

The ever increasing use of the drastic power of eminent domain has led to a growing tendency by the courts to limit judicial review by deciding issues relating to the public necessity for the taking and the good faith of the condemnor on the basis of a loosely defined presumption of regularity in favor of governmental agencies. This tendency, as exemplified in this case, should be reviewed by this Court to the end that property owners may be assured their day in court on such issues, and in order to place clearly defined limitations on the speculative exercise of the power of eminent domain by agencies of government.

Conclusion

Wherefore, the petition for a writ of certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,

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June 27th, 1953.

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Respondent.

BRIEF OF RESPONDENT, CITY OF MIAMI, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, CITY OF MIAMI, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

As nearly as can be determined from its petition and brief CARLOR COMPANY, INC., the petitioner, asks this Court to review a decision of the Supreme Court of Florida which affirmed a decree of the Circuit Court of Dade County, Florida, entered in 1951. The decree dismissed petitioner's complaint in equity which collaterally attacked a judgment of the Circuit Court entered in 1944 in eminent domain proceedings.1/

1/ While the decree dismissing the collateral attack seems principally challenged, so much is injected concerning alleged irregularities in the original condemnation proceedings, that this respondent cannot be certain just what it is that petitioner wants this court to review.

OPINIONS BELOW

Petitioner's statement that the opinion of the Florida Supreme Court is not reported is incorrect. It appears as *Carlor Co Inc v. City of Miami,* 62 So2d 897.

JURISDICTION

The writ is sought under 28 USC 1257(3).

THE QUESTION PRESENTED

Petitioner says that the question presented is whether it has been deprived of its property without due process of law in violation of the 14th Amendment to the Federal Constitution.

STATUTE INVOLVED

Petitioner says that the statutory provision involved is §73.01 Florida Statutes (Laws 1941 c. 20930,§1).

STATEMENT OF THE CASE

In April 1943 the City of Miami brought eminent domain proceedings to acquire certain lands owned by *Carlor Company, Inc.* which were situated in Dade County, Florida. (R 39) *Carlor* appeared and contested the proceedings. (R 45,55,61) The case was tried to a jury which determined just compensation for the land to be $255,000. (R 65) By a final judgment entered August 14, 1944 the land was appropriated to the *City of Miami* conditioned upon payment of the jury's award. (R 64) The *City* deposited the requisite amount in the registry of the Court. *Carlor* neither moved for a new trial nor took an appeal from the final judgment, but sought and obtained an order of disbursal and accepted the award. (R 71,72)

Almost seven years later, in July 1951, *Carlor* filed a complaint in equity praying the Court to set aside the condemnation judgment upon the ground that it was

obtained by fraud. (R 1) This complaint was dismissed by the Chancellor for failure to state a claim upon which the relief sought could be granted. (R 27) An amended complaint then was filed. (R 32) It was likewise dismissed by summary final decree (R 38), which, on appeal, was affirmed by the Supreme Court of Florida. (R 71) *Carlor,* as petitioner here, now seeks a review of that affirmance.

ARGUMENT

It is uncontroverted that Petitioner appeared in and contested the eminent domain proceedings in 1944; that there was a jury trial; that the just compensation determined by the jury was paid into the Court registry and that petitioner accepted the award. It is likewise uncontroverted that in 1951 petitioner, by a proceeding in equity, collaterally attacked the final judgment in condemnation by filing a complaint which, with attached exhibits, covers 26 pages of the record (R 1,26); that the Chancellor carefully considered this complaint upon respondent's motion to dismiss and decreed that there was a failure to state a claim; that petitioner thereafter was permitted to amend the complaint and that the Chancellor again adjudged there was a failure to state a claim; that thereafter petitioner took an appeal to the Supreme Court of Florida which, upon due consideration, affirmed the Chancellor.

These undisputed facts bring into play two fundamental rules of law. First: That an owner of land taken by virtue of eminent domain proceedings who has accepted and been paid the award of damages cannot afterward contest the validity of the taking, either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceedings may be. *Nichols on Eminent Domain,* 3rd Ed Vol 6, Chap 28.321, Subhead 2. Second: That when the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court (assuming arguendo that such occurred) does not deprive the unsuccessful party of his property.

without due process of law in violation of the 14th Amendment of the Constitution of the United States. *Walker v. Sauvinet,* 92 US 90 (1876); *Head v. Amoskeag Mfg Co,* 113 US 9 (1885); *Morley v. Lake Shore & Michigan Southern Ry Co,* 146 US 162 (1892); *Bergemann v. Backer,* 157 US 655 (1895); *Central Land Co v. Laidley,* 159 US 103 (1895); *Ballard v. Hunter,* 204 US 241 (1907); *Delmar Jockey Club v. Missouri, ex rel Atty Gen,* 210 US 324 (1908); *Bonner v. Gorman,* 213 US 86 (1909); *Enterprise Irrigation District v. Farmers Mutual Canal Co,* 243 US 157 (1917); *Corrigan v. Buckley,* 271 US 323 (1926); *Milwaukee E R & L Co v. Wisconsin, ex rel Milwaukee,* 252 US 100 (1920); *Worchester County Trust Co v. Riley,* 302 US 292 (1937); *Neblett v. Carpenter,* 305 US 297 (1938).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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